Supreme Court, U.S.
FILED
AUG 30 1999
OFFICE OF THE CLERK

No. 99-38

In the

SUPREME COURT OF THE UNITED STATES

BUFFELEN WOODWORKING CO., *et al.*,
Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Washington

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General
State of Washington
DONALD F. COFER*
WILLIAM BERGGREN COLLINS
Assistant Attorneys General
400 General Admin. Bldg.
P.O. Box 40123
Olympia WA 98504-0123
(360) 753-5528
Counsel for Respondent
** Counsel of Record*

No. 99-38

In the

SUPREME COURT OF THE UNITED STATES

BUFFELEN WOODWORKING CO., *et al.*,
Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Washington

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General
State of Washington
DONALD F. COFER*
WILLIAM BERGGREN COLLINS
Assistant Attorneys General
400 General Admin. Bldg.
P.O. Box 40123
Olympia WA 98504-0123
(360) 753-5528
Counsel for Respondent
* *Counsel of Record*

TABLE OF CONTENTS

JURISDICTION 1

STATEMENT 1

I. Washington's Taxes on Extracting, Manufacturing, and Selling 1

II. Prior Litigation Over the Extracting, Manufacturing, and Selling B&O Taxes. 3

A. *Tyler Pipe* 3

B. *National Can II* 4

C. *American National Can* and *Digital Equipment* 5

III. Procedural History of This Case 6

REASONS WHY THE PETITION SHOULD BE DENIED 11

I. The Court Lacks Jurisdiction Because There Is No Final Judgment 11

II. Retroactive Application of the 1987 Two-Way Credits Does Not Violate Due Process. 14

A. Petitioners Are Entitled to No Relief for Pre-*Tyler Pipe* Tax Periods Because *Tyler Pipe* Should Be Applied Prospectively. 14

B. Petitioner's Argument that Retroactive Application of the Two-Way Credit Fails to Provide Them "Meaningful Backward-Looking Relief" Is Meritless 15

C. Petitioners' "Bait and Switch" Procedural Due Process Argument Also Is Meritless 20

III. The Apportionment Questions Petitioners Pose Are So Explicitly Foreclosed by Prior Decisions of This Court As To Leave No Room for Real Controversy. 24

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

American Mfg. Co. v. St. Louis,
250 U.S. 459 (1919)..... 26, 27

American Nat'l Can Corp. v. Department of Rev.,
114 Wash. 2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990)..... 5, passim

Aponaug Mfg. Co. v. Stone,
314 U.S. 577 (1941), *aff'g per curiam* 190 Miss. 805, 1 So.2d 763 (1941) 27

Armco Inc. v. Hardesty,
467 U.S. 638 (1984)..... 19

Associated Indus. v. Lohman,
511 U.S. 641 (1994)..... 16, 22

Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) 19

Benjamin Franklin Thrift Stores, Inc. v. Henneford, 187 Wash. 472,
60 P.2d 86 (1936)..... 23

Board of Directors of Rotary Int'l v. Rotary Club of Duarte,
481 U.S. 537 (1987)..... 26

Bond v. Burrows, 103 Wash. 2d 153,
690 P.2d 1168 (1984)..... 23

Central Greyhound Lines v. Mealey,
334 U.S. 653 (1948)..... 29

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971)..... 4

Chicago Bridge & Iron Co. v. Department of Rev., 98 Wash. 2d 814, 659 P.2d 463, *appeal dismissed for want of a substantial federal question*, 464 U.S. 1013 (1983) 28

City of Winchester v. American Woodmark Corp., 252 Va. 98, 471 S.E.2d 495 (1996) 29, 30

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 27, 29

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 12, 13

Dandridge v. Williams, 397 U.S. 471 (1970) 15

Department of Treasury v. Allied Mills, Inc., 318 U.S. 740 (1943), *aff'g per curiam* 220 Ind. 340, 42 N.E.2d 34 (1942) 28

Department of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941) 28

Digital Equipment Corp. v Department of Rev., 129 Wash. 2d 177, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273 (1997) ..... 6, passim

Evco v. Jones, 409 U.S. 91 (1972) 30

Field Enterprises v. Washington, 352 U.S. 806 (1956), *aff'g per curiam* 47 Wash. 2d 852, 289 P.2d 1010 (1955) 28

Flynt v. Ohio, 451 U.S. 619 (1981) 12, 13

Freeman v. Hewitt, 329 U.S. 249 (1946) 19

General Motors Corp. v. City & County of San Francisco, 69 Cal. App. 4th 448, 81 Cal. Rptr. 544 (1999) 16

General Motors Corp. v. Washington, 377 U.S. 436 (1964) 28

Hagen v. Utah, 510 U.S. 399 (1994) 28

Haring v. Prosise, 462 U.S. 306 (1983) 28

Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) 15, 22

Hathorn v. Lovorn, 457 U.S. 255 (1982) 12

Heck v. Humphrey, 512 U.S. 477 (1994) 28

Heisler v. Thomas Collier Co., 260 U.S. 245 (1922) 27

Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) 27

International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1943) 28, 29

J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) 30

James B. Beam Distilling Co. v Georgia, 501 U.S. 529 (1991) 15

Jensen v. Henneford, 185 Wash. 209, 53 P.2d 607 (1936) 23

Lacey Nursing Ctr., Inc. v. Department of Rev., 128 Wash. 2d 40, 905 P.2d 338 (1995) 22

Lacoste v. Department of Conservation, 263 U.S. 545 (1924) 27

M & Associates, Inc. v. City of Irondale, 723 So.2d 592 (Ala. 1998) 29, 30

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) ..... 15, passim

Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608, 611 (1892) 12

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 19

National Can Corp. v. Department of Rev., 105 Wash. 2d 327, 732 P.2d 134 (1986) (National Can I) 4

National Can Corp. v. Department of Rev.,109 Wash.2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988)(National Can II) ... .4, passim

Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442 (1998) 20, 21, 22, 24

Nipges v. Thornton, 119 Wash. 464, 206 P. 17 (1922) 23

Norton Co. v. Department of Rev., 340 U.S. 534 (1951) 28

Oklahoma Tax Commission v.Jefferson Lines, Inc.,514 U.S. 175 (1995)... ... ...*19, 20, 28, 29*

Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) 27

Reich v. Collins, 513 U.S. 106 (1994) 20, 21, 22, 24

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 13, 14

Reynolds Metals Co. v. Washington,
65 Wash. 2d 882, 400 P.2d 310,
appeal dismissed for want of a substantial federal question, 382 U.S. 160 (1965) 26, 27

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749 (1995) 22

Simpson v. State, 26 Wash. App. 687,
615 P.2d 1297, *review denied*,
94 Wash. 2d 1022 (1980) 23

Sonneborn Bros. v. Cureton,
262 U.S. 506 (1923) 28

Standard Pressed Steel Co. v Department of Rev., 419 U.S. 560
(1975) 28

Stone v. Stapling Machines Co.,
220 Miss. 470, 71 So. 2d 205,
appeal dismissed for want of a substantial federal question, 348 U.S. 802 (1954) 28

Street v. New York, 394 U.S. 576
(1969) 26

Tyler Pipe Indus., Inc. v. Department of Rev., 105 Wash. 2d 318,
715 P.2d 123 (1986) 4

Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev., 483 U.S. 232 (1987) ..... 2, passim

United States v. Stauffer Chem. Co.,
464 U.S. 165 (1984) 28

Utah Power & Light Co. v. Pfost,
286 U.S. 165 (1932) 27

Webb v. Webb, 451 U.S. 493 (1981) 26

Westinghouse Electric Corp. v. King, 678 S.W.2d 19 (Tenn. 1984), *appeal dismissed for want of a substantial federal question*, 470 U.S. 1075 (1985) 28

Woodruff v. Parham, 8 Wall. 123 (1868) 28

Statutes

Wash. Rev. Code § 82.04.230 1

Wash. Rev. Code § 82.04.240 1

Wash. Rev. Code § 82.04.250 1

Wash. Rev. Code § 82.04.270 1

Wash. Rev. Code § 82.04.440(2) 2

Wash. Rev. Code § 82.04.440(4) 2

Wash. Rev. Code § 82.04.440(2)(1984) 3

Wash. Rev. Code § 82.32.150 22

Wash. Rev. Code § 82.32.180 22

Wash. Rev. Code § 82.98.030 23

1987 Wash. Laws, 2d Ex. Sess., ch. 3 5

1985 Wash. Laws, Ch. 190 § 4 23

28 U.S.C. § 1257 26

28 U.S.C. § 1257(a) 1, 11

Rules

Wash. Admin. Code § 458-20-19301(9).....18

Wash. Admin. Code § 458-20-19301(8)(b).....18

Supreme Court Rule 10(b) 16

Treatises

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 94 (7th ed. 1993) 12

Constitutional Provisions

Wash. Const. art. II, § 26 22

JURISDICTION

This Court lacks jurisdiction over the petition because the decision of the Supreme Court of Washington is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257(a). We discuss this jurisdictional issue at page 11, *infra*.

STATEMENT

We begin with a brief description of the taxes at issue in this case and prior litigation concerning those taxes. We will then discuss the complex procedural history of this case.

I. Washington's Taxes on Extracting, Manufacturing, and Selling.

This case concerns Washington's business and occupation (B&O) taxes on the activities of extracting, manufacturing, and selling. The extracting and manufacturing taxes are imposed on the activities of extracting or manufacturing in Washington. The measure of both taxes is the "value of the products" extracted or manufactured in Washington. Wash. Rev. Code §§ 82.04.230, .240. B&O taxes also are imposed on the activity of selling, either at wholesale or retail. The measure of the selling taxes is the "gross proceeds of sales" in Washington. Wash. Rev. Code §§ 82.04.250, .270.

It is important to understand that the extracting, manufacturing, and selling B&O taxes are imposed only when those activities take place in Washington. For example, a business located in Washington does not pay any manufacturing B&O tax with respect to products it manufactures in another state or any selling B&O tax with respect to products it sells in another state. Washington does not have jurisdiction to tax extracting, manufacturing, or selling activities that take place in other states. In this respect, the B&O taxes differ from net income taxes that include within their measure all of a business's net income from every jurisdiction derived from every business activity.

The B&O tax system now includes the two-way system of credits suggested by this Court in *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232, 246 (1987). Under the two-way credit system, all persons engaged in extracting or manufacturing activities in Washington must pay an extracting or manufacturing B&O tax. All persons engaged in selling in Washington must pay a retailing or wholesaling B&O tax.

Under the two-way credit mechanism, both local and interstate businesses are entitled to a tax credit against Washington's selling tax. The Washington B&O tax imposed on the sale of a product may be reduced by the amount of any extracting or manufacturing tax paid to Washington or another jurisdiction on the activities of extracting or manufacturing the product. Wash. Rev. Code § 82.04.440(2).

A credit also is available for Washington extractors or manufacturers selling in interstate commerce. This is a credit against Washington's extracting or manufacturing tax. The Washington tax imposed on the activities of extracting or manufacturing a product may be reduced by the amount of any selling tax paid to another jurisdiction on the activity of selling the product. This credit is available only for selling taxes paid to jurisdictions other than Washington. Wash. Rev. Code § 82.04.440(4).[1]

The two-way credit system ensures that interstate and local businesses will bear the same tax burden on their extracting, manufacturing, and selling activities.

---

[1] Petitioners cite subsection (2) as the statutory basis for "Internal Credits" for local commerce and subsection (4) as the statutory basis for "External Credits" for interstate commerce. Pet. 6-7. To the extent those statements suggest that the credits authorized by subsection (2) are limited to local commerce or that the credits authorized by subsection (4) are the only ones available to interstate commerce, they are inaccurate. Subsection (2) also grants credits to interstate businesses. Petitioners' descriptions of the comparative "burdens" associated with "Internal Credits" and "External Credits" also are misleading. We discuss this point at page 17-18, *infra*.

II. Prior Litigation Over the Extracting, Manufacturing, and Selling B&O Taxes.

A. *Tyler Pipe.*

Beginning in 1984, taxpayers brought over 300 actions challenging the extracting, manufacturing, and selling B&O taxes on Commerce Clause grounds. Many but not all of the current petitioners were among a group of 71 appellants in *Tyler Pipe*, 483 U.S. 232 (1987). At that time, the B&O tax system did not have the current two-way credit system. Instead, there was a "multiple activities exemption," which provided that "[p]ersons taxable under [the Washington retailing or wholesaling taxes] shall not be taxable under [the Washington extracting or manufacturing taxes] with respect to extracting or manufacturing of the products so sold." Wash. Rev. Code § 82.04.440(2) (1984). The former multiple activities exemption thus applied only to local commerce.

In *Tyler Pipe*, this Court held "Washington's multiple activities exemption invalid." 483 U.S. at 253. The multiple activities exemption was defective because it applied only if a business paid a Washington selling B&O tax. It did not apply if a similar selling tax was paid to another state. This violated the principle of internal consistency—"that is the [tax] must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade." *Id.* at 247.

If every state imposed the extracting, manufacturing, and selling taxes at issue in *Tyler Pipe*, an interstate manufacturer would pay multiple taxes. For example, an interstate manufacturer would pay a manufacturing B&O tax to Washington and a selling gross receipts tax to another state because the multiple activities exemption would not apply. A local manufacturer would only pay Washington's selling B&O tax because the multiple activities exemption would apply to excuse the manufacturing B&O tax.

An integral part of *Tyler Pipe* was the Court's explanation of how to repair the system. Washington could

make the multiple activities exemption internally consistent by extending equivalent benefits to interstate commerce. According to the Court: "The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." *Id.* at 246. This credit prescription was repeated later in the opinion when the Court stated that "an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to another State would presumably cure the discrimination." *Id.* at 249.

A second significant holding in *Tyler Pipe* concerned apportionment. This Court affirmed the Washington Supreme Court's holding that the selling B&O taxes paid by Tyler Pipe and many of the current petitioners were fairly apportioned. *Id.* at 248-51.

B. *National Can II.*

Washington argued in *Tyler Pipe* that any decision adverse to the State should have only prospective application. Brief for Appellee at 44-48, Tr. of Oral Arg. at 44, *Tyler Pipe* (Nos. 85-1963 and 85-2006). Acknowledging the argument, this Court vacated the Washington Supreme Court's judgments in *Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wash. 2d 318, 715 P.2d 123 (1986), and *National Can Corp. v. Department of Rev.*, 105 Wash. 2d 327, 732 P.2d 134 (1986) (*National Can I*), and remanded for further proceedings not inconsistent with its opinion. 483 U.S. at 251-53.

On remand, the Washington Supreme Court held this Court's discrimination holding applied purely prospectively, employing the federal civil retroactivity analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *National Can Corp. v. Department of Rev.*, 109 Wash. 2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988) (*National Can II*). The *Tyler Pipe* plaintiffs therefore were denied any

refunds for taxable activities before June 23, 1987, the date of this Court's decision. The *Tyler Pipe* decision was purely prospective because the decision did not apply retroactively to the litigants in that case.

After the ruling in *National Can II*, hundreds of other taxpayers dismissed their refund claims for tax periods before the *Tyler Pipe* decision.

C. *American National Can* and *Digital Equipment.*

Tyler Pipe was handed down on June 23, 1987. Seven weeks later, on August 11, 1987, Washington enacted the two-way credit system suggested by this Court in *Tyler Pipe* to eliminate the constitutional defects of the multiple activities exemption. Wash. Rev. Code § 82.04.440; 1987 Wash. Laws, 2d Ex. Sess., ch. 3 (App. 1a).

Under section 3 of the 1987 law, if a court determined that relief was appropriate regarding the former multiple activities exemption for any periods before the law's August 12, 1987 effective date, refunds based on the two-way credits were to be the exclusive relief available to taxpayers. (App. 4a). Since *Tyler Pipe* was purely prospective, no relief was appropriate under section 3 for any periods before that decision.

In *American Nat'l Can Corp. v. Department of Rev.*, 114 Wash. 2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990), a large group of corporations, including about one-half of these petitioners, next challenged the 1987 two-way credit law, as well as its retroactive application to the seven-week "interim period" after the *Tyler Pipe* decision from June 23 through August 11, 1987. The corporations claimed the 1987 law discriminated against interstate commerce and violated principles of equal protection and due process of law. *Id.* at 241. In *American Nat'l Can*, the Washington Supreme Court upheld the constitutionality of the 1987 two-way credit law and applied it retroactively to the seven-week interim period.

In *Digital Equipment Corp. v. Department of Rev.*, 129 Wash. 2d 177, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273 (1997), the Washington Supreme Court reaffirmed its holding in *American Nat'l Can* that retroactive application of the two-way credits to the seven-week interim period was constitutional. In *Digital*, five members of the court questioned the court's earlier decision in *National Can II* that *Tyler Pipe* should be given prospective application. Three justices, in the lead opinion, concluded that the court in *National Can II* erroneously addressed an issue that was not left open by the mandate. 129 Wash. 2d at 183-89, 194, 916 P.2d at 936-38, 941. Two other justices disagreed with this conclusion, but stated in dictum that they disagreed with the prospectivity holding in *National Can II*. *Id.* at 195 & n.76, 916 P.2d at 942 & n.1. Four justices disagreed with the lead opinion and would have followed *National Can II*. They concluded that departing from *National Can II* would result in selective prospectivity, which this Court has rejected. *Id.* at 205-10, 916 P.2d at 947-49.

Although the *Digital* court was divided over the prospective application of *Tyler Pipe*, the justices agreed that retroactive application of credits for gross receipts taxes paid to other jurisdictions was a constitutional way to correct any discrimination caused by the multiple activities exemption.

III. Procedural History of This Case.

In December 1984, petitioner Buffelen Woodworking Company filed a complaint for refund of manufacturing B&O taxes, alleging that taxes it had paid since January 1980 violated the Commerce Clause. *Buffelen* was one of well over 300 refund actions filed between 1984 and 1990 challenging Washington's B&O taxes on Commerce Clause grounds. Many of these actions involved more than one taxpayer. By 1994, slightly more than 100 actions remained, the rest having been dismissed. On March 4, 1994, over the objection of the defendant Washington State Department of Revenue (Department), the trial court consolidated 103 of the actions

(with approximately 220 plaintiffs) for all purposes under the caption of *Buffelen Woodworking Co. v. State*.

By 1997, only 47 of the 103 consolidated actions remained, the rest having been dismissed by stipulation or by motion of the Department. On May 15, 1997, the trial court granted the plaintiffs' motions to bring three more refund actions under the March 1994 consolidation order, bringing the total to 50 actions with approximately 115 named plaintiffs.

By 1994, two injunction actions presenting similar issues also were pending before the same trial court: *W.R. Grace & Co.—Conn. v. State* and *Chrysler Motors Corporation v. State*. *Grace* and *Chrysler* were not consolidated with *Buffelen*, but the taxpayers in those cases were represented by the same counsel. In April 1996, the trial court heard cross-motions for partial summary judgment in *Grace* and *Chrysler*. The Department's motions were limited to questions of issue preclusion. The taxpayers' motions sought only interlocutory orders declaring (1) that *Tyler Pipe* applied retroactively, (2) that taxes assessed against them for any periods before June 23, 1987 were "void and unenforceable," (3) that taxes assessed against them for any later periods discriminated against interstate commerce, and (4) that neither claim preclusion nor issue preclusion barred the taxpayers' requested relief.

The trial court denied the Department's motions and granted the two taxpayers' motions in part, ruling that *Tyler Pipe* applied retroactively. In addition, the trial court *sua sponte* granted the Department partial summary judgment that the two-way credit law, when applied retroactively and prospectively to all the assessment periods, was constitutional. After further proceedings, the trial court entered final summary judgment orders in *Grace* and *Chrysler* in June 1997.

On May 23, 1997, the plaintiffs in the 50 consolidated *Buffelen* actions noted a joint motion for partial summary judgment for hearing on June 20, 1997. Like the taxpayers' motions in *Grace* and *Chrysler*, the *Buffelen* motion sought

only an interlocutory order declaring that (1) *Tyler Pipe* applied retroactively to invalidate taxes allegedly paid by the plaintiffs for pre-*Tyler Pipe* tax periods, (2) due process required that the plaintiffs receive full refunds of any unconstitutional taxes they might have paid, and (3) neither issue preclusion nor claim preclusion barred any plaintiff from obtaining the relief sought in the motion. The Department made no cross-motion for summary judgment in response to the plaintiffs' motion, but moved to strike certain evidence offered in support of their motion and filed seven affidavits demonstrating that the plaintiffs were not entitled to the relief sought in their motion.

Consistent with its earlier rulings in *Grace* and *Chrysler*, the trial court granted the *Buffelen* plaintiffs' motion only in part, concluding that the *Tyler Pipe* discrimination ruling applies retroactively. The trial court concurrently advised the parties of its intent to enter *sua sponte* an order in *Buffelen* granting partial summary judgment to the Department like the *sua sponte* orders in *Grace* and *Chrysler*. The Department opposed entry of such an order in its favor because of several other issues in *Buffelen* that were unresolved, including claim preclusion, issue preclusion, and standing.

The 50 cases consolidated in *Buffelen* involved approximately 115 named plaintiffs. The consolidated case was unwieldy and, as a result, the record is far from complete. Petitioners assert that they engage in a combination of manufacturing and selling activities in interstate commerce and have paid the Washington manufacturing or selling taxes. Pet. 2-3. This statement is inaccurate. For example, one of the petitioners, Hecla Mining Company, seeks a refund of only extracting B&O taxes. The misstatement illustrates a central problem in the case. There are so many petitioners that their claims are confused and the record is inadequate.

For many of the petitioners, there is no admissible evidence in the record that they engaged in manufacturing or extracting or even that they paid B&O taxes of any kind to

Washington. There also is a substantial dispute about the tax periods involved in these consolidated actions that the trial court refused to resolve. The trial court declined to rule which if any of the petitioners have standing to litigate the constitutional issues it decided. Since many of the petitioners also were parties in *Tyler Pipe* and *American Nat'l Can*, they may be barred by issue preclusion from relitigating the apportionment issue resolved in Washington's favor in *Tyler Pipe* and the issue of the validity of the two-way credit resolved in Washington's favor in *American Nat'l Can*. Many of the petitioners also may be barred by claim preclusion from bringing successive refund actions for the same tax periods involved in *Tyler Pipe* and *American Nat'l Can*. The trial court also refused to address these issues.

On July 18, 1997, before entering a summary judgment order in *Buffelen*, the trial court granted the plaintiffs' motion to modify the March 1994 order consolidating the *Buffelen* cases. The court severed three plaintiffs, Anheuser-Busch, Inc., Apple Computer, Inc., and Herman Miller, Inc., and "consolidated" all their refund claims under the caption of *Anheuser-Busch, Inc. v. State*. These three plaintiffs asserted that even if Washington's selling B&O taxes were constitutional, they were not subject to them because they did not sell the products in Washington. These "place of sale claims" provided an independent state law basis for granting refunds to these petitioners. The trial court did not rule on these "place of sale claims."

After the trial court severed the three *Anheuser-Busch* plaintiffs, it entered single *sua sponte* summary judgment orders in *Buffelen* and in *Anheuser-Busch*. Pet. 61a-80a. In the two orders, the trial court ruled that *Tyler Pipe* should be applied retroactively, but that refunds for pre-*Tyler Pipe* tax periods would be limited to amounts based on credits for any gross receipts taxes the plaintiffs paid to other jurisdictions. Because all the plaintiffs waived any refund claims based on such credits for all tax periods at issue in their refund actions,

the trial court awarded no tax refunds to any of them. The court's *sua sponte* summary judgment orders dismissed the plaintiffs' refund claims with prejudice, except for those of the three plaintiffs in the consolidated *Anheuser-Busch* action. The court also entered findings under Wash. Super. Ct. Civ. R. 54(b) in *Anheuser-Busch* to permit the parties to appeal that interlocutory partial summary judgment order.

The trial court denied the Department's motions for reconsideration in both consolidated actions on September 5, 1997. The plaintiffs in both *Buffelen* and *Anheuser-Busch* appealed to the Washington Supreme Court, which granted their motion to consolidate the two appeals. The plaintiffs in *Grace* and *Chrysler* earlier had appealed to the Washington Supreme Court, which had consolidated their two appeals at the suggestion of those plaintiffs. The Department cross-appealed in all four cases, seeking review of the trial court's rulings that *Tyler Pipe* applied retroactively. In *Buffelen* and *Anheuser-Busch*, the Department also sought review of the trial court's refusal to resolve the questions of standing, issue preclusion, and claim preclusion.

Although *Grace/Chrysler* and *Buffelen/Anheuser-Busch* were separately briefed and argued, the Washington Supreme Court issued a single opinion to resolve the two consolidated appeals. In its opinion, the court affirmed three key rulings of the trial court. First, the court decided that *Tyler Pipe* applies retroactively based only on "principles of stare decisis," concluding that a majority of the court had so held in *Digital*. 137 Wash. 2d at 592-93, 973 P.2d at 1017 (Pet. App. 11a-12a). Second, the current B&O tax system with its two-way credit system complies with all Commerce Clause requirements. 137 Wash. 2d at 596-98, 973 P.2d at 1018-19 (Pet. App. 15a-17a). Third, retroactive application of the two-way credits to cure the discrimination caused by the former multiple activities exemption does not violate due process. 137 Wash. 2d at 598-603, 973 P.2d at 1019-22 (Pet. App. 18a-24a).

The court did not decide, however, several other federal and state law questions raised by the Department, including standing, issue preclusion, and claim preclusion, that are intertwined with the federal questions presented by petitioners. Instead, the court "preserv[ed]" those questions "for trial court resolution on remand, as may be necessary." 137 Wash. 2d at 584, 973 P.2d at 1013 (Pet. App. 2a). Although the court declined to decide the standing, issue preclusion, and claim preclusion issues, the court commented that they were "plainly the most significant and meritorious" of the issues presented in the Department's cross-appeals. 137 Wash. 2d at 591 & n.7, 973 P.2d at 1016 & n.7 (Pet. App. 9a-11a).

The court stated in conclusion it was "affirm[ing] the trial court judgments on these key points" and "remand[ing] the cases to the trial court for further action consistent with this opinion." 137 Wash. 2d at 604, 973 P.2d at 1022 (Pet. App. 25a). All the plaintiffs in *Buffelen* and *Anheuser-Busch*, except Grace and Chrysler, filed a joint petition to this Court. Grace and Chrysler also filed a joint petition, No. 99-31. The Department filed a conditional cross-petition, No. 99-223, in response to the joint petition in No. 99-31.

REASONS WHY THE PETITION SHOULD BE DENIED

There is no basis for review in this case. The decision of the Washington Supreme Court is correct, and petitioners have not cited any decision of this Court or any other court in conflict with the decision below. In fact the questions presented by petitioners have long been settled. Many of the petitioners merely are trying to relitigate issues they lost in *Tyler Pipe* and *American Nat'l Can*. The petition should be denied.

I. The Court Lacks Jurisdiction Because There Is No Final Judgment.

This Court has jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had[.]" 28 U.S.C. § 1257(a). If the decision

of the highest state court is not a final judgment, this Court lacks jurisdiction over the case. *Flynt v. Ohio*, 451 U.S. 619 (1981). Traditionally, the Court also requires state court judgments to be final as to all parties and issues. For example, if there are multiple defendants, the record must show that the judgment concludes the controversy as to all of them. *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 611 (1892); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 94 (7th ed. 1993). Since the claims of all the petitioners have been consolidated into a single case, the decision below must resolve the controversy completely as to all of them. The controversy is not completely resolved because the Washington Supreme Court "remand[ed] the cases to the trial court for further action consistent with this opinion." 137 Wash. 2d at 604, 973 P.2d at 1022 (Pet. 25a). *See Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982).

Under the Washington Supreme Court's opinion, the trial court must determine which, if any, of the petitioners has standing to litigate the questions presented in their petition. The trial court must also resolve federal and state law questions of issue preclusion based on the judgments in *Tyler Pipe* and *American Nat'l Can*. There also are unresolved questions of claim preclusion, which would prevent petitioners that were parties in *Tyler Pipe* or *American Nat'l Can* from bringing successive refund actions for the same tax periods. *See* 137 Wash. 2d at 584, 592, 973 P.2d at 1013, 1016-17 (Pet. App. 2a, 10a-11a). Finally, the trial court must address the "place of sale claims" of the petitioners in *Anheuser-Busch*.

This case does not fall within *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which holds that a decision may be a final judgment even though the case is remanded to a trial court for further proceedings. First, under *Cox* a decision is final if "the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. The remaining issues in this case are not controlled or preordained by the

Washington Supreme Court's decision sustaining the validity of the B&O tax and the two-way credit.

Second, a decision is final if the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. In this case, the constitutional issues will not necessarily all survive if Washington substantially prevails on standing, issue preclusion, and claim preclusion. Nor will the issues survive in *Anheuser-Busch* if those petitioners prevail on their "place of sale claims."

Third, a decision is final if "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. In this case, the federal issue might be preserved if some petitioners prevail on standing, issue preclusion, and claim preclusion, or if the *Anheuser-Busch* petitioners are unsuccessful in their "place of sale claims."

Finally, the Court occasionally considers a decision final where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action[.]" *Id.* at 482-83. The Court has applied this exception only when there were "identifiable federal statutory or constitutional policies which would have been undermined by the continuation of the litigation in the state courts." *Flynt v. Ohio*, 451 U.S. at 622. In this case, there are no federal policies that would be undermined by continuation of the litigation. Indeed, as we have pointed out, this case involves long settled law.

If this case falls within *Cox Broadcasting*, the Court should decline to exercise its discretionary jurisdiction because the record is inadequate for review. The trial court did not require petitioners to prove the factual predicates of their claims. See pages 8-9, *supra*. This Court has refused to exercise its jurisdiction when confronted with such an inadequate record. For example, in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), an appellant sought review of a city ordinance governing charitable solicitations. The Court observed that it

follows "a policy of strict necessity in disposing of constitutional issues" such that it will not resolve a constitutional question unless it is necessary. *Id.* at 568-69. One rule the Court applies as part of this policy is to examine "if the record presents some other ground upon which the case may be disposed of[.]" *Id.* at 569.

In *Rescue Army*, the Court refused to exercise its jurisdiction because the record was inadequate. *Id.* at 575 ("The record presents only bare allegations that he was charged criminally with violating [the ordinance] and that those sections are unconstitutional, on various assignments, as applied to his alleged solicitations.") The same is true in this case. The Court should not exercise its jurisdiction until it has an adequate record before it to resolve all the federal questions raised in the case.

II. Retroactive Application of the 1987 Two-Way Credits Does Not Violate Due Process.

A. Petitioners Are Entitled to No Relief for Pre-*Tyler Pipe* Tax Periods Because *Tyler Pipe* Should Be Applied Prospectively.

Before turning to petitioners' due process arguments, there is an independent basis for sustaining the Washington Supreme Court's decision that the *Buffelen* petitioners are not entitled to refunds for periods before *Tyler Pipe*. There is no possible basis for pre-*Tyler Pipe* relief unless that decision applies retroactively. Thus, the question whether *Tyler Pipe* applies retroactively is a "necessary predicate" to both of petitioners' Due Process Clause questions.

In *National Can II*, 109 Wash. 2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988), the Washington Supreme Court initially held that the Commerce Clause discrimination ruling this Court announced in *Tyler Pipe* applied purely prospectively. Now, years later, the court below has reversed course and applied *Tyler Pipe* retroactively. As a result, *Tyler Pipe* has been applied prospectively to some

litigants and retroactively to others. This is exactly the kind of selective prospectivity this Court condemned in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991), and *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86 (1993).

The Washington Supreme Court erred in giving *Tyler Pipe* retroactive application. As the prevailing party below, the Department may defend its orders of dismissal against petitioners on any ground properly raised below, whether that ground was relied upon, rejected, or even considered by the courts below. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). If the Court were to review either of the Due Process Clause questions presented by petitioners, the Department would defend its orders of dismissal on the basis of this selective prospectivity question it argued and preserved below.[2]

B. Petitioners' Argument that Retroactive Application of the Two-Way Credits Fails to Provide Them "Meaningful Backward-Looking Relief" Is Meritless.

Petitioners devote most of their petition to an argument that retroactive application of the 1987 two-way credit statute violates the Due Process Clause as interpreted in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Pet. 12-24. The court below correctly concluded that this argument is meritless. 137 Wash. 2d at 594-98, 973 P.2d at 1018-19 (Pet. App. 13a-17a).

Petitioners seem to suggest that retroactive application of the two-way credit statute is "inadequate" because it "does not comport with any of the three alternatives this Court specified in *McKesson* as the permissible retrospective cures for a discriminatory tax scheme." Pet. 15-16. That argument is

---

[2] This selective prospectivity question is addressed more fully in the Department's conditional cross-petition in Supreme Court No. 99-233.

based on an obvious misreading of *McKesson*.[3] As the court below recognized, the *McKesson* line of cases hold that a "State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to that determination," and that the Due Process Clause demands only that, "to cure the illegality of the tax as originally imposed," the State must "ultimately collect a tax for the contested tax period" that no longer impermissibly discriminates. 137 Wash. 2d at 594-95, 973 P.2d at 1018 (Pet. App. 13a-15a) (quoting *McKesson*, 496 U.S. at 39-40, and *Associated Indus. v. Lohman*, 511 U.S. 641, 656 (1994)). Retroactively extending the benefit of the two-way credits to petitioners does exactly that.[4]

Petitioners also attempt to compare this relief to the hypothetical retroactive tax scheme proposed by Florida and rejected by this Court in *McKesson*, arguing that "Washington

---

[3] In *Digital*, 129 Wash. 2d 177, 191, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273 (1997), the taxpayer made the same erroneous argument.

[4] Petitioners' reliance on the California Court of Appeal's decision in *General Motors Corp. v. City & County of San Francisco*, 69 Cal. App. 4th 448, 81 Cal. Rptr. 2d 544 (1999), is misplaced. The California court reasoned that the two-way credits this Court suggested in *Tyler Pipe* (which Washington quickly adopted) "would effectively make local and out-of-state manufacturers equally subject to selling taxes and exempt from manufacturing taxes." *Id.* at 456, 81 Cal. Rptr. 2d at 548-49. In contrast, the credits San Francisco proposed "would not fully eliminate the discrimination suffered by General Motors[.]" *Id.* Furthermore, when the California court discussed the Washington Supreme Court's approval in *Digital* of retroactively applying the two-way credits, the California court distinguished *Digital* as involving "recent tax years" (August 1987 credits applied retroactively to January 1983) and a taxpayer that candidly conceded "it had not been double taxed." *Id.* Thus, the California court did not perceive its holding to be in conflict with that of the Washington Supreme Court in *Digital*. (Here, less than one-third of these petitioners have refund claims for any periods before January 1983, and only three petitioners made any attempt to prove they ever might have been "double taxed.") Regardless of how petitioners interpret the California intermediate appellate court's decision, however, surely they understand that the decision would not create a "conflict" on an "important federal question" within the meaning of Rule 10(b). *See* Pet. 14-15.

did not apply the credits" for pre-*Tyler Pipe* tax periods "as to intrastate commerce[.]" Pet. 15-16. That is not a valid comparison. There is nothing "hypothetical" about the refunds Washington offered to pay petitioners for any gross receipts taxes they paid to other jurisdictions. That petitioners spurned this relief does not make it any less "actual." And since retroactively granting the credits to interstate businesses completely eliminates their "exposure to the burden of a multiple tax on manufacturing and wholesaling," *Tyler Pipe*, 483 U.S. at 246, we cannot perceive how *McKesson* mandates that petitioners receive any additional retroactive relief.

Petitioners next assert they "paid Washington over $100,000,000" of unconstitutional taxes, but received "zero relief." Pet. 16-18. They attribute the result to burdensome "procedures and requirements" that were "impossible" for them to satisfy. Pet. 13, 18. However, as explained above, beyond bare allegations, there is almost nothing in the record suggesting that petitioners paid any B&O taxes—constitutional or otherwise—to Washington during the periods in contest. Furthermore, in rejecting petitioners' due process arguments, the court below understood the *real* reason why petitioners received "zero relief": "Because the taxpayers waived any refund claims based on [credits for gross receipts taxes paid to other jurisdictions], the trial court awarded no tax refunds to any of them." 137 Wash. 2d at 589, 973 P.2d at 1015 (Pet. App. 7a). Petitioners cannot turn their tactical decision to refuse any relief into the foundation for a federal claim under the Due Process Clause.

Petitioners wrongly claim[5] that the two-way credit involves burdensome recordkeeping requirements including

---

[5] Petitioners are well aware that the Department does not require special records because they made the same claim in *American Nat'l Can*. In response the Department submitted affidavits explaining what records are required and how a test period is used to establish a claim for credits. See App. 24a-32a. These affidavits were submitted in this case as part of the Department's argument that issue preclusion bars many of the petitioners,

special records to trace which specific products manufactured elsewhere are sold in Washington. Pet. 15 n. 16, 20. Washington only requires the normal records maintained by a business such as sales contracts, shipping documents and tax returns. Wash. Admin. Code § 458-20-19301(9). App.18a-19a. There is no requirement for special records to trace specific products. Instead the Department authorizes taking credits based on a "test period, formulary or volume percentage basis[.]" Wash. Admin. Code § 458-20-19301(8)(b). (App. 18a).[6]

Finally, petitioners argue at length that the 1987 two-way credit system cannot "create in hindsight a nondiscriminatory scheme" because that system allegedly "continues to discriminate against interstate commerce." Pet. 17-24. The court below was familiar with these arguments, having answered them previously in *American Nat'l Can*. *See* 137 Wash. 2d at 586, 591, 596, 973 P.2d at 1014, 1016, 1019 (Pet. App. 4a, 9a, 15a).[7]

First, petitioners argue that "strict criteria" for qualification of other states' taxes exclude "the vast majority" of those taxes, thereby creating "facial discrimination." Pet. 19-20, 23. This is petitioners' way of saying that the credits apply only to gross receipts taxes, not to net income taxes, value added taxes, or franchise taxes. *See* Wash. Rev. Code § 82.04.440(5). When presented with this same argument in *American Nat'l Can*, the Washington Supreme Court explained

---

who were parties in *American Nat'l Can*, from relitigating the validity of the two-way credit.

[6] For example, the trial court awarded Chrysler tax credits in the amount of $125,000 based only on general business records, with no requirement of product tracing. See Respondent's Brief in Opposition W.R. Grace-Conn. v. State, Supreme Court. No. 99-31.

[7] About one-half of these petitioners were parties in *American Nat'l Can*. App. 22a-23a. Under state issue preclusion rules, they should have been precluded from relitigating this issue. The Washington Supreme Court remanded the case to the trial court to address this issue preclusion question.

in detail why this "cannot constitute facial discrimination." 114 Wash. 2d at 241-44, 787 P.2d at 547-49. *See Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. at 175, 192 n.6 (1995) (discussing the requirement that if states provide credits for payment of "in-state taxes," they must extend such credits to payment of "equivalent out-of-state taxes").

Second, in a related argument, petitioners rely on their own failure to qualify for the credits and meaningless statistics to contend that the two-way credit system discriminates against interstate commerce "in practical effect." Pet. 17-22. This argument also was answered in *American Nat'l Can*, where similar statistics were offered to prove the "continuing discriminatory effect of Washington's law." 114 Wash. 2d at 240, 246-47, 787 P.2d at 547, 550. The statistics simply reflect the fact that few states other than Washington currently impose gross receipts taxes on businesses. That other sovereign states have made different tax choices does not render Washington's tax system discriminatory. The validity of one state's tax system does not depend on the tax laws of other states. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 277 n.12 (1978); *Freeman v. Hewitt*, 329 U.S. 249, 256 (1946); *see also Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 338 (1994) (O'Connor, J., concurring in the judgment in part and dissenting in part) (recognizing the "well-established proposition that States need not conform their taxing practices to those of their neighbors").[8]

---

[8] This Court applies the hypothetical internal consistency test precisely because "[a]ny other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States[.]" *Tyler Pipe*, 483 U.S. at 247 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984)). Petitioners must concede that Washington's two-way credit system is internally consistent. Furthermore, if every other state *actually* imposed some form of gross receipts taxes on extracting, manufacturing, and selling activities, at higher rates than Washington's B&O taxes on those three activities, what petitioners call the External Credit would "eliminate 100%" of interstate manufacturers' selling B&O tax liabilities *and* would "eliminate 100%" of

Third, based on the false premise that Washington does not offer equivalent credits to interstate businesses, petitioners argue that the two-way credit system gives local manufacturers a "half-price deal" denied to interstate manufacturers. Pet. 21-23. This is the same as the "two privileges" argument rejected in *American Nat'l Can*. 114 Wash. 2d at 245-46, 787 P.2d at 549. Noticeably lacking supporting authority, the argument amounts in substance to an assertion that the negative Commerce Clause prohibits a state from ever providing a credit for one of its taxes against another—regardless of whether the state also provides an equivalent credit for similar out-of-state taxes. The decisions of this Court hold to the contrary. *See Jefferson Lines*, 514 U.S. at 192 n.6.[9]

In short, neither the Due Process Clause question nor the Commerce Clause discrimination question presented by petitioners is a substantial federal question.

C. Petitioners' "Bait and Switch" Procedural Due Process Argument Also Is Meritless.

Petitioners also argue the Washington Supreme Court's retroactive application of the 1987 two-way credit statute, as the appropriate relief for the Washington court's retroactive application of *Tyler Pipe*'s discrimination ruling, conflicts with this Court's decisions in *Reich v. Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc. v. Florida Dep't of Rev.*, 522 U.S. 442 (1998). Pet. 3-4, 7-12. As the court below correctly concluded, petitioners' reliance on *Reich* and *Newsweek* as support for their "bait and switch" attack on the 1987 credit

---

their manufacturing B&O tax liabilities. Without changing any feature of its tax system, Washington would then have an "automatic External Credit." Pet. 18-19. This demonstrates that the alleged "profound disparities in the actual benefits conferred" by Washington's two-way credit system are the product of other states' tax policy choices, not anything inherent in the 1987 two-way credit law.

[9] At pages 21-24 of the petition, petitioners also present what in substance are arguments that Washington's taxes are unfairly apportioned. We discuss apportionment at pages 24-30, *infra*.

statute is misplaced. 137 Wash. 2d at 593-96, 598-99, 973 P.2d at 1017-18, 1019-20 (Pet. App. 12a-15a, 18a-19a).

In *Reich*, the Georgia Supreme Court interpreted a broadly worded statute authorizing a taxpayer to claim a refund of "any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him" as inapplicable when a tax statute is declared unconstitutional. 513 U.S. at 109. Therefore, the Georgia court dismissed the refund action *without addressing the merits* of Reich's federal claims. *Id.* at 110. This Court reversed, holding that the Due Process Clause did not permit Georgia to hold out a "clear and certain" postpayment procedural remedy in the form of a refund action and then, after taxpayers had paid disputed taxes, to declare no such procedural remedy ever existed. *Id.* at 111.

In *Newsweek*, the Florida District Court of Appeal, failing to consider this Court's holding in *Reich*, interpreted Florida law as permitting prepayment tax challenges and therefore dismissed Newsweek's postpayment refund action to contest sales taxes the Florida Supreme Court earlier had held to violate the First Amendment. This Court summarily reversed, explaining that under Florida law there was a longstanding practice of permitting taxpayers to bring refund actions for taxes paid under an unconstitutional statute and that the State did not dispute "this settled understanding" of Florida law. Based on *Reich*, this Court held that Newsweek was entitled to a clear and certain remedy and thus it could "use the refund procedures to adjudicate the merits of its claim."

The problem in *Reich* and *Newsweek* was that the state went from a post-deprivation refund remedy to an exclusive pre-deprivation remedy. Thus, it was impossible to challenge taxes that had already been paid. Washington's two-way credit law did not "switch" the post-deprivation refund remedy to a pre-deprivation remedy. The two-way credit law authorized refunds necessary to cure the constitutional defect in the multiple activities exemption. This Court has recognized that states have the authority to tailor a refund remedy to cure

constitutional defects in their tax systems. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-41, 44 n.27 (1990); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100-02 (1993); *Associated Indus. v. Lohman*, 511 U.S. 641, 656 (1994); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755-56 (1995).

Washington law offered these petitioners a choice of either a prepayment procedural remedy (an injunction action under Wash. Rev. Code § 82.32.150) or a postpayment procedural remedy (a refund action under Wash. Rev. Code § 82.32.180). Petitioners chose to pursue refund actions. In sharp contrast to what occurred in *Reich* and *Newsweek*, the courts below adjudicated the merits of their claims. That is all the "process" petitioners were "due" in this situation. There was no "bait and switch." Petitioners received precisely the postpayment procedural remedy promised by Washington law.

Petitioners' assertion that until August 1987 Washington law promised them full refunds of any taxes they paid is both incorrect and immaterial. The statute petitioners allegedly relied upon (Pet. 9), Wash. Rev. Code § 82.32.180, has never required full refunds whenever a tax statute is declared unconstitutionally discriminatory. It is merely a conditional waiver of the State's sovereign immunity pursuant to Wash. Const. art. II, § 26, which provides that the Washington Legislature "shall direct by law, in what manner, and in what courts, suits may be brought against the state." *Lacey Nursing Ctr., Inc. v. Department of Rev.*, 128 Wash. 2d 40, 48-54, 905 P.2d 338, 342-45 (1995).

As such, it is only a procedural statute. It provides no direction to the courts as to what form or degree of backward-looking relief, if any, is appropriate when a tax statute or its application is declared invalid. Such a question of appropriate relief always has been determined on a case-by-case basis by considering all pertinent provisions of federal and state law, including any applicable state statutes enacted before the action is concluded. *See, e.g., American Nat'l Can*, 114 Wash. 2d

236, 249-53 & n.4, 787 P.2d 545, 551-53 & n.4, *cert. denied*, 498 U.S. 880 (1990); *Bond v. Burrows*, 103 Wash. 2d 153, 161-63, 690 P.2d 1168, 1172-73 (1984); *Benjamin Franklin Thrift Stores, Inc. v. Henneford*, 187 Wash. 472, 484-88, 60 P.2d 86, 91-93 (1936); *Jensen v. Henneford*, 185 Wash. 209, 220, 53 P.2d 607 (1936); *Nipges v. Thornton*, 119 Wash. 464, 467-68, 206 P. 17, 18-19 (1922); *Simpson v. State*, 26 Wash. App. 687, 695-96, 615 P.2d 1297, 1301-02, *review denied*, 94 Wash. 2d 1022 (1980); Wash. Rev. Code § 82.98.030.

Moreover, petitioners were on notice, as of April 30, 1985, that they definitely would *not* be entitled to full refunds under Washington law if they were to obtain a judgment that the former multiple activities exemption statute discriminated against interstate commerce. That was the effective date of the conditional one-way credit law, which limited potential refunds to selling gross receipts taxes paid to other jurisdictions. 1985 Wash. Laws Ch. 190, § 4. App. 5a.

Nor could petitioners reasonably believe they would receive full refunds based on the vague dictum[10] later appearing in *National Can II*: "If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds." 109 Wash.2d at 880-81, 749 P.2d at 1286. In that dictum, the Washington court did not say that state law would mandate *full* refunds if *Tyler Pipe* were applied retroactively; it said "refunds" would be required. Two years after *National Can II*, when the court actually confronted the question of appropriate relief under Washington law for the Commerce Clause discrimination holding in *Tyler Pipe*, the court squarely held that "[f]ull refunds are not appropriate" and that the taxpayers instead were entitled to more limited refunds

---

[10] As explained at page 4, *supra*, the Washington Supreme Court held in *National Can II* that the discrimination ruling announced in *Tyler Pipe* applied purely prospectively. Because the Washington Supreme Court held the former multiple activities exemption was constitutional during all the tax periods at issue in *National Can II*, *see* 109 Wash. 2d at 881, any discussion of what would otherwise be appropriate retroactive relief in that case obviously was unnecessary to the court's decision.

based on the retroactive application of the two-way credit law. *American Nat'l Can*, 114 Wash. 2d at 253, 787 P.2d at 583. Thus, in referring to "refunds" in *National Can II*, the court probably meant refunds based on retroactive application of the 1985 and 1987 credit statutes.[11]

Regardless of whether petitioners' characterization of Washington law before August 1987 is accurate, however, it is immaterial. Neither *Reich* nor *Newsweek* overruled the *McKesson* line of cases, which permitted the State of Washington to retroactively "reformulate and enforce" its B&O taxes "during the contested tax period[s] in any way that treats petitioner[s] and [their] competitors in a manner consistent with the dictates of the Commerce Clause." *McKesson*, 496 U.S. at 40. That is precisely what the Washington Legislature did in 1987 and what the Supreme Court of Washington did below. *Reich* and *Newsweek* are consistent with the *McKesson* line of cases because the changes from a post-deprivation remedy to a pre-deprivation remedy in *Reich* and *Newsweek* were unrelated to curing the underlying discrimination problems with the taxes at issue.

In short, this Due Process Clause question presented by petitioners is not a substantial federal question.

III. The Apportionment Questions Petitioners Pose Are So Explicitly Foreclosed by Prior Decisions of This Court As To Leave No Room for Real Controversy.

Petitioners argue their petition should be granted "to resolve a question left open" by this Court's earlier decisions. That question, according to petitioners, is "Does an unapportioned tax on the gross income of interstate

---

[11] Unlike the taxpayers in *Reich* and *Newsweek*, it is hard to fathom how the court's dictum in *National Can II* could have induced petitioners to take any actions they otherwise would not have taken. *National Can II* was issued in 1988, *after* the last of the petitioners' taxes allegedly were paid in November 1987 in reliance on the State's "bait." See Pet. 8, 11.

manufacturers violate the Commerce Clause requirement of fair apportionment?" Pet. 24.[12]

Petitoners' question misstates Washington law. Washington does not impose a tax on the "gross income of interstate manufacturers." Washington only taxes extracting, manufacturing, and selling activities that take place in this state. If a Washington business manufactures a product in California and sells it in Oregon, not one cent of the gross income from those activities will be subject to B&O tax. None of Washington's B&O taxes are unapportioned. The extracting, manufacturing, and selling B&O taxes all are inherently apportioned because the taxes apply only when those taxed activities (extracting, manufacturing, or sales) occur in Washington.

It is unclear what "unapportioned" Washington tax on "interstate manufacturers" petitioners are referring to. They reluctantly acknowledge that this Court unanimously upheld Washington's selling B&O taxes as fairly apportioned in *Tyler Pipe*,[13] but state that this Court "has not addressed apportionment" of Washington's B&O tax on "manufacturing activities." Pet. 26. Thus, they seem to argue that the "question left open" by this Court's earlier decisions is whether Washington's manufacturing and extracting B&O taxes are fairly apportioned.[14]

---

[12] Elsewhere, petitioners state the question as "Does such a tax credit scheme, without apportionment, satisfy the nondiscrimination and apportionment requirements of the commerce clause, as interpreted in this Court's decisions?" Pet. i. Petitioners have not cited, and the Department is unaware of, any decision of this Court interpreting the negative Commerce Clause as requiring a tax credit—as opposed to a tax—to be apportioned.

[13] In rejecting the taxpayers' apportionment argument in *Tyler Pipe*, this Court correctly observed that it rested "on the erroneous assumption that through the B&O tax, Washington is taxing the unitary activity of manufacturing and wholesaling." 483 U.S. at 251.

[14] At the end of their argument, however, petitioners ask this Court to "requir[e] apportionment of gross receipts taxes on selling and

However, while petitioners did challenge the selling B&O taxes on apportionment grounds, petitioners did not present an apportionment challenge to the manufacturing and extracting B&O taxes in the Washington Supreme Court. In reviewing state court decisions under 28 U.S.C. § 1257, this Court will not consider a federal question unless it was either addressed by or properly presented to the state courts. *Street v. New York*, 394 U.S. 576, 581-85 (1969). The Washington Supreme Court's opinion below did not address any apportionment issue other than the one resolved by this Court in *Tyler Pipe*. The court below stated that petitioners "ask us to ignore our own and the United States Supreme Court's rulings and revisit the apportionment issue." 137 Wash. 2d at 596, 973 P.2d at 1019 (Pet. App. 16a).[15]

When the highest state court's decision is silent on a federal question presented in a petition, this Court assumes that the issue was not properly presented below, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the petitioner bears the burden of defeating that assumption by demonstrating that the state courts had "a fair opportunity to address the federal question that is sought to be presented," *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Even if this Court were to conclude that petitioners properly presented below the question whether Washington's manufacturing and extracting taxes are fairly apportioned, the question is not substantial. For nearly a century, this Court has consistently rejected Commerce Clause challenges to state or local gross receipts taxes on manufacturers or extractors measured, like Washington's B&O taxes, by the value of the

---

manufacturing businesses," which suggests their petition also challenges Washington's selling B&O taxes on apportionment grounds. Pet. 30.

[15] The court cited none of this Court's or its own decisions involving apportionment challenges to manufacturing or extracting taxes, *e.g.*, *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919); *Reynolds Metals Co. v. Washington*, 65 Wash. 2d 882, 400 P.2d 310, *appeal dismissed for want of a substantial federal question*, 382 U.S. 160 (1965), which suggests that the court was not addressing such a question.

products manufactured or extracted. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 & n.7 (1981) (extracting); *Aponaug Mfg. Co. v. Stone*, 314 U.S. 577 (1941), *aff'g per curiam* 190 Miss. 805, 1 So. 2d 763 (1941) (manufacturing); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932) (generating electricity); *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927) (extracting); *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924) (extracting); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (extracting); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) (extracting); *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919) (manufacturing); *see also Reynolds Metals Co. v. Washington*, 65 Wash. 2d 882, 400 P.2d 310, *appeal dismissed for want of a substantial federal question*, 382 U.S. 160 (1965) (manufacturing). This question is well-settled.

Another Commerce Clause question petitioners may be asking this Court to consider is the one they litigated below: whether Washington's selling B&O taxes are fairly apportioned. They concede that this question is not "left open" by this Court's earlier decisions, admitting that this Court has repeatedly rejected apportionment challenges to these taxes in a "series of decisions culminating in *Tyler Pipe*." Pet. 29 n.34.

In *Tyler Pipe*, this Court unanimously upheld Washington's selling B&O taxes as fairly apportioned because

> the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. See *Moorman Mfg. Co. v. Bair*, 437 U.S., at 280-81 (gross receipts tax on sales to customers within State would be "plainly valid"); *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S., at 564 (selling tax measured by gross proceeds of sales is "apportioned exactly to the activities taxed").

483 U.S. at 251.

In rejecting the apportionment challenge renewed by petitioners here,[16] this Court in *Tyler Pipe* applied settled Commerce Clause case law. For well over a century, this Court has upheld nondiscriminatory gross receipts taxes on interstate sales of goods imposed by the state of destination. *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Field Enters., Inc. v. Washington*, 352 U.S. 806 (1956), *aff'g per curiam* 47 Wash. 2d 852, 289 P.2d 1010 (1955); *Norton Co. v. Department of Rev.*, 340 U.S. 534 (1951); *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944); *Department of Treasury v. Allied Mills, Inc.*, 318 U.S. 740 (1943), *aff'g per curiam* 220 Ind. 340, 42 N.E.2d 34 (1942); *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941); *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923); *Woodruff v. Parham*, 8 Wall. 123 (1868); *see also Westinghouse Elec. Corp. v. King*, 678 S.W.2d 19 (Tenn. 1984), *appeal dismissed for want of a substantial federal question*, 470 U.S. 1075 (1985); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wash. 2d 814, 659 P.2d 463, *appeal dismissed for want of a substantial federal question*, 464 U.S. 1013 (1983); *Stone v. Stapling Machs. Co.*, 220 Miss. 470, 71 So. 2d 205, *appeal dismissed for want of a substantial federal question*, 348 U.S. 802 (1954).

In *Jefferson Lines*, 514 U.S. 175, upon which petitioners rely, this Court upheld Oklahoma's sales tax on the

---

[16] The record below shows that 19 of these petitioners were parties in *National Can I*, No. 85-2006, and litigated in *Tyler Pipe* whether Washington's B&O selling taxes are fairly apportioned. (App. 21a). Therefore, federal common law rules of issue preclusion should have prevented these petitioners and any other petitioners in privity with them from relitigating this same issue in the courts below. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994); *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984). If this Court were to review the third question presented by petitioners, it would first need to address this threshold federal issue preclusion question. *See, e.g., Hagen v. Utah*, 510 U.S. 399, 409 (1994); *Haring v. Prosise*, 462 U.S. 306, 313-17 (1983).

full price of a ticket for interstate transportation services as consistent with the Commerce Clause. 514 U.S. at 177, 200. *Jefferson Lines* might have rendered "suspect" the continuing authority of *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), *see Jefferson Lines*, 514 U.S. at 179, 189-92 & nn.5-6, 195-96 & n.7; *id.* at 200-01 (Scalia, J., concurring in the judgment); *id.* at 201-06 (Breyer, J., dissenting), but it did not undermine in the slightest the above lines of cases concerning taxes imposed on production or sales of goods. Indeed, in *Jefferson Lines*, this Court cited *Commonwealth Edison*, *International Harvester*, and *Tyler Pipe*, without questioning their holdings or their reasoning. *See id.* at 183, 188-89, 192 n.6, 199-200. The Washington Supreme Court below simply followed settled apportionment rules applied in this Court's controlling precedents, as was its duty.

Nor does the Washington Supreme Court's decision below create any "split of authority among the states" on this apportionment issue, as petitioners argue. Pet. 30. The decision below is not in conflict with either *City of Winchester v. American Woodmark Corp.*, 252 Va. 98, 471 S.E.2d 495 (1996), or *M & Assocs., Inc. v. City of Irondale*, 723 So.2d 592 (Ala. 1998).[17]

The gross receipts taxes the Virginia and Alabama courts struck down in *American Woodmark* and *M & Assocs.* differed dramatically from the Washington selling B&O taxes, which apply only to sales that take place in Washington. In *American Woodmark*, the city attempted to apply its gross receipts tax to 100% of the company's nationwide gross revenues, merely because the company's headquarters building was in the city. 471 S.E.2d at 496, 498. The company operated 24 facilities in 13 different states, including manufacturing plants, distribution centers, and service and

---

[17] There is no suggestion whatsoever in either *American Woodmark* or *M & Assocs.* that *Jefferson Lines* undermined this Court's apportionment holding in *Tyler Pipe*.

sales offices. None of those facilities were located in the city and almost none of the company's customers were either. *Id.*

Similarly, in *M & Assocs.*, the city attempted to apply its gross receipts tax to all the company's receipts from sales, including sales in other states, again merely because the company's headquarters building was in the city. 723 So. 2d at 592-93. The Alabama court correctly held that the city's tax failed the "internal consistency" test. *Id.* at 598-99. Thus, the local gross receipts taxes in *American Woodmark* and *M & Associates* truly were unapportioned.

In contrast, the selling B&O taxes this Court upheld in *Tyler Pipe* are inherently apportioned because they are imposed only on sales in Washington. No other state could constitutionally impose a similar gross receipts tax on the same sales. *See, e.g., Evco v. Jones*, 409 U.S. 91 (1972); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938). Washington's selling B&O taxes obviously are internally consistent and are fairly apportioned.

In short, neither of the Commerce Clause apportionment questions presented by petitioners is a substantial federal question.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHRISTINE O. GREGOIRE
Attorney General
State of Washington
DONALD F. COFER*
WILLIAM BERGGREN COLLINS
Assistant Attorneys General
Counsel for Respondent
*Counsel of Record

August 30, 1999